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BEFORE THE POLLUTION CONTROL HEARINGS BOARD  
STATE OF WASHINGTON

CLYDE V. HALL,	)	
	)	PCHB NO. 92-32
Appellant,	)	
	)	
v.	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
STATE OF WASHINGTON, DEPARTMENT	)	AND ORDER
OF ECOLOGY and CITY TRANSFER	)	
OF KENT, INC.,	)	
	)	
Respondent.	)	

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This matter came on for hearing on May 15, 1992, in Lacey, Washington, before the Pollution Control Board, with Board members Harold S. Zimmerman, Board Chairman, and Annette McGee in attendance and Administrative Law Judge John H. Buckwalter presiding.

At issue was Ground Water Permit No. G2-27567 issued by the Washington State Department of Ecology (DOE hereinafter) to City Transfer of Kent, Inc. (Transfer, hereinafter).

Appearances were:

Clyde J. Hall, pro se, for Appellant.

Tom McDonald, Assistant Attorney General, for DOE.

Robert M. Smythe, Attorney, for Transfer.

Proceedings were recorded by Kim L. Otis of Gene Barker Associates and were also taped. Witnesses were sworn and testified, exhibits were examined and arguments of parties were heard. From these, the Board makes these

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-32

FINDINGS OF FACT

I

Transfer operates a gravel mining site in Pierce County, Washington, to the west of Lake Tapps, overlooking the City of Sumner and the White River Valley. The surrounding area is wooded and is populated with residences. The appellant, Mr. Hall, is the Executive Secretary of Ridgeview Homeowners for the Environment, a non-profit unincorporated group of twenty-seven (27) families which he represents in this action. The water for the group is supplied from fifteen (15) wells which are within 2000 feet of the Transfer site.

II

In order to provide water for mining and washing gravel, Transfer had an 8"x57' well drilled in 1989 to supply 55 gallons of water per minute. After complaints from a resident, Mr. Patrick Clerget, that the Transfer well had reduced his water supply and from two other residents, on June 14, 1989, DOE directed Transfer to cease pumping water from its well. (The Clerget protest was resolved on February 14, 1990 by an agreement in which Transfer agreed to construct a new well for the Clergets along with performance of certain other stipulations.)

On June 14, 1989, DOE directed Transfer to cease pumping water from its well.

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III

In accordance with DOE requirements, on June 21, 1989 Transfer submitted an application to DOE for permit No. G2-27567 to appropriate the ground water which would be drawn by the well. The application specified that the well would be 8"x57", would draw 55 gallons of water per minute, and would be operated 8 calendar months, Monday through Friday. During September, 1989, Transfer had its well deepened to 285' and hired Robinson and Noble, Inc. to perform a pump test and analysis of the well.

IV

Because of inconclusive results from tests performed by Robinson and Noble in October of 1989, on May 3, 1990 DOE granted Transfer a temporary permit for operation of its well to allow further testing which was then conducted by Robinson and Noble in that same month.

V

DOE conducted an extensive examination for possible adverse effects of the Transfer well on the supply capability of the surrounding residential wells. Field investigations were performed by DOE personnel, and well logs for 21 wells within a one mile radius of the Transfer well were reviewed. Other documents reviewed by DOE were: Pump Test & Aquifer Analysis-City Transfer, Dieringer Gravel Pit Well, October 1989, and Addendum to October 1989 Report; City Transfer Pump Test, both by Robinson and Noble, Inc., and Geologic

Evaluation and Reserve Estimate of Vashon Advance Outwash Glacial  
Materials On The Valleyview Site Near Dieringer, Pierce County,  
Washington, by McLucas and Associates, Inc..

VI

On January 17, 1992, DOE issued its Report of Examination which recommended approval of Transfer's application. The Report also recommended the issuance of a permit to Transfer allowing appropriation of 39 gallons of water per minute for gravel mining operations with year round usage, if needed, but not in excess of 15 acre-feet per year and specifying that the permit shall be subject to existing rights and the following provisions:

Installation and maintenance of an access port as described in Ground Water Bulletin No. 1 is required.

An approved metering device shall be installed and maintained in accordance with RCW 90.03.360, WAC 508-020 through -040 (installation, operation, and maintenance requirements are attached).

A certificate of water right will not be issued until a final investigation is made.

Water wells constructed within the state shall meet the minimum standards for construction and maintenance provided under RCW 18.104, Washington Water Well Construction Act of 1972, and Chapter 173-160 WAC, Minimum Standards for Construction and Maintenance of Wells.

The Water Resources Act of 1971 specifies certain criteria regarding utilization and management of the waters of the state in the best public interest. Favorable consideration of this application is based on sufficient waters available at least during portions of the year. However, it is pointed out to the applicant that this use of water may be subject to regulation at certain times, based on the necessity to maintain water quantities sufficient for preservation of the natural environment.

VII

On the same date, January 17, 1992, and on the same document, in its FINDINGS OF FACT AND DECISION, DOE found that "...all facts relevant and material to the subject application have been thoroughly investigated" and that "...water is available for the appropriation and the appropriation as recommended is a beneficial use and will not be detrimental to existing rights or the public welfare".

Accordingly, DOE ordered that, "subject to existing rights and indicated provisions" the permit be granted "to allow appropriation of public ground water for the amount and uses specified in the foregoing report". The Report and Order with an accompanying cover letter were released by DOE on the same date, January 17, 1992.

VIII

Appellant's request for review requesting denial of the permit was timely filed with this Board.

IX

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such. From these Findings of Fact the Board makes these

CONCLUSIONS OF LAW

I

This Board has jurisdiction over the parties and subject matter of this action. RCW 43.21B.110. Because this is an appeal of the granting of a permit, the appellant has the burden of proof.

II

Appellant's main thrust in his Notice of Appeal was his belief that Transfer has violated Pierce County and DOE water rights regulations and orders many times in the past, that "Despite the violations.. Pierce County has done nothing to restrain, restrict or control City Transfer of Kent", and that "As is apparent from past activities ... we know that City Transfer of Kent will not comply with any limits set by anyone ... (including those set by DOE in its Order)".

III

This Board is not, under law, a regulatory or enforcement authority. It does not have the power to investigate, hear, or decide alleged violations except in a rescission action as discussed below. In the matter at hand, the Board, by statute, has the authority only to determine whether the permit, as issued, was justified under provisions of the law, with no resultant material environmental impact or detriment to the rights of others, and with appropriate conditions imposed. This Board's determinations cannot be based on fears or suppositions that the terms of the permit will be violated; such prejudgment is not permitted by our courts, by our laws, nor by our national or state Constitutions. Accordingly, the evidence Appellant proposed to enter regarding past alleged violations and fear of future violations by Transfer was declared irrelevant and inadmissible. Such

1 matters must be left to other agencies and other forums which have the  
2 jurisdiction to resolve such matters.

3 IV

4 If the terms or conditions of this permit are violated, or if it  
5 appears that the water production of another well is adversely  
6 affected by Transfer's well, a party damaged thereby has the right, to  
7 lodge a complaint with the issuing agency, DOE, which then has a duty  
8 to investigate and take whatever action is appropriate under law. One  
9 such action could be rescission of the permit, and such rescission  
10 would be subject to appeal to this Board by the permit holder. Then,  
11 and only then, would this Board have authority to consider and act on  
12 a permit holder's alleged wrongdoings.

13 V

14 There remains only one issue to be decided which is, as indicated  
15 in Appellant's Notice of Appeal, whether there is adequate "assurance  
16 that the use of 39 gpm/15 acre feet per year by City Transfer of Kent  
17 will not adversely affect our (the residents') water supply".

18 VI

19 DOE's evidence showed that the wells of the residences and the  
20 Transfer well are located in an area which is supplied by two separate  
21 aquifers, an upper aquifer and a lower aquifer. These two aquifers  
22 are separated by a third intervening layer which acts as an aquitard,  
23 although it is not totally impermeable and does allow some small  
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25 FINAL FINDINGS OF FACT,  
26 CONCLUSIONS OF LAW AND ORDER  
27 PCHB NO. 92-32

1 amount of seepage from the upper to the lower aquifer. The flow of  
2 water in the aquifers is generally from the residential areas toward  
3 the Transfer site.

#### 4 VII

5 All but two of the residential well and spring water sources draw  
6 from the upper aquifer while the Transfer well, because it is encased  
7 except at its bottom and because of its depth, draws water from the  
8 lower aquifer. Accordingly, Transfer's withdrawal of water from the  
9 lower aquifer should have little or no effect on the surrounding  
10 residential water supplies which draw from the upper aquifer.

#### 11 VIII

12 Mr. Hall testified that no neighbors have complained to him about  
13 a failure or reduction in their water supply and that the only  
14 condition he knows of which might indicate an adverse effect from the  
15 Transfer well is the appearance of sand in several wells. However,  
16 Appellant offered no evidence confirming that this condition was, in  
17 fact, caused by the Transfer well. Nor was there any evidence  
18 presented by the appellant to rebut the respondent's evidence and  
19 conclusions presented above.

#### 20 IX

21 We conclude that the Appellant has not met his burden of proof to  
22 show that the Transfer well will result in damage to the water  
23 supplies of the neighboring residences. We further conclude that the  
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1 investigations conducted by DOE justified its approval of Transfer's  
2 application for a water appropriation permit.

3 X

4 However, we recognize the concerns of Appellant and his neighbors  
5 over the continuing adequate supply of water for their homes, and we  
6 are concerned that DOE itself conditioned issuance of a certificate of  
7 water right until after "a final investigation is made". We conclude  
8 that the permit shall be a temporary permit conditioned as defined in  
9 our Order below.

10 XII

11 Any Finding of Fact deemed to be a Conclusion of Law is hereby  
12 adopted as such. From these Conclusions of Law, the Board enters this  
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ORDER

THAT the Department of Ecology's granting of Permit G2-27567 to City Transfer of Kent is AFFIRMED except

THAT it shall be issued as a Temporary Certificate for a maximum of 6 (six) months, subject to all the conditions/provisions imposed by DOE's Report of Examination and as repeated above in our Finding of Fact No VI, with the further conditions,

THAT DOE shall assure that adequate equipment and/or procedures are established to assure that the Transfer well will not draw more than 39 gmp and not more than 15 acre-feet per year with adequate DOE monitoring to assure the same, and

THAT DOE's final investigation shall be completed within six (6) months of the date of this ORDER and the findings and resulting DOE ORDER granting or denying a permanent permit to Transfer shall be sent to the appellant, Mr. Hall, or his delegate, and to other interested parties, and

THAT those results will be subject to a new appeal, for good reason, if filed with this Board within 30 days of issuance of the results of the final investigation, and such appeal, if any, shall be based only upon the results of the final investigation and other activities subsequent to the date of this ORDER, all other previous issues being subject to the doctrines of res judicata and/or collateral estoppel, and

SO ORDERED this 25th day of June, 1992.

HAROLD S. ZIMMERMAN, Chairman

JOHN H. BUCKWALTER  
Administrative Law Judge

FINAL FINDINGS OF FACT,  
CONCLUSIONS OF LAW AND ORDER  
PCHB NO. 92-32